FILED BY CLERK
MAY 22 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JEFF W. BROWN and VERONICA L. BROWN, husband and wife, Plaintiffs/Appellants/ Cross-Appellees, v. MATTHEW S. McFARLAND and SUSAN R. McFARLAND, husband and wife, Defendants/Appellees/ Cross-Appellants.	2 CA-CV 2005-0063 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20013784

Honorable Christopher C. Browning, Judge

AFFIRMED

Law Office of Ethan Steele, P.C.
By Ethan Steele
Tucson
Attorney for
Plaintiffs/Appellants/Cross-Appellees

Altfeld Battaile & Goldman, P.C.
By John C. E. Barrett
Tucson
Attorneys for
Defendants/Appellees/Cross-Appellants

E S P I N O S A, Judge.

¶1 Appellants Jeff and Veronica Brown contest the trial court's denial of their application for attorney fees in this quiet title action. They also claim there was insufficient evidence to support the trial court's award of damages to appellees Matthew and Susan McFarland. Finding no error, we affirm.

Factual and Procedural Background

¶2 This action to quiet title was filed in 2001 by the Browns after the McFarlands, pursuant to a survey they had commissioned, removed a fence that appeared to encroach onto the McFarlands' newly purchased property. After a trial, the court found the Browns had "acquired by adverse possession" a portion of the disputed property, including a section covered with fill material, which is referred to as the "berm." The court awarded the Browns fifteen hundred dollars in compensation for the fence that was removed.

¶3 The McFarlands had filed a counterclaim for trespass, seeking damages to compensate them for debris that had fallen and continued to fall from the Browns' property onto theirs.[1] The court found that "dirt, rocks, boulders, and the like fall off of the [Browns'] sloped berm and onto the [McFarlands'] land" and awarded five thousand dollars in compensatory damages for that trespass. The Browns sought their attorney fees pursuant to A.R.S. § 12-1103(B). After a hearing, the court denied their application for fees and this appeal followed.

---

[1]The McFarlands also filed a notice of cross-appeal, but they only respond to the Browns' arguments and do not raise any new issues in their briefs.

Attorney Fees

¶4 "The exclusive basis for attorneys' fees for quiet title actions lies in A.R.S. § 12-1103." *Lewis v. Pleasant Country, Ltd.*, 173 Ariz. 186, 195, 840 P.2d 1051, 1060 (App. 1992); *see also Lange v. Lotzer*, 151 Ariz. 260, 261, 727 P.2d 38, 39 (App. 1986). The relevant portion of that statute, subsection B, provides:

> If a party, twenty days prior to bringing the action to quiet title to real property, requests the person, other than the state, holding an apparent adverse interest or right therein to execute a quit claim deed thereto, and also tenders to him five dollars for execution and delivery of the deed, and if such person refuses or neglects to comply, the filing of a disclaimer of interest or right shall not avoid the costs and *the court may allow plaintiff, in addition to the ordinary costs, an attorney's fee to be fixed by the court*.

(emphasis added). Our legislature "has expressly determined that only a prevailing party who follows certain prerequisites may recover attorney's fees in quiet title actions." *Lange*, 151 Ariz. at 262, 727 P.2d at 40. At the hearing on this issue, the Browns conceded that no deed had been tendered until months after the original complaint was filed, which did not comply with the statutory requirements. The trial court agreed, finding that "[b]y [the Browns'] own admission, the quitclaim deed was not tendered within the statutorily mandated time period." Because we adopt the plain meaning of statutory language whenever possible, *see Powers v. Carpenter*, 202 Ariz. 116, ¶ 9, 51 P.3d 338, 340 (2002), we agree with the trial court's conclusion that the Browns' failure to timely tender a deed and compensation pursuant to the statute rendered them ineligible to receive a fee award.[2] *See Lewis*, 173 Ariz. at 195, 840

[2]Curiously, the judgment appealed from in this case states: "The Plaintiffs have complied with the requirements of A.R.S. § 12-1103." But, in its under advisement ruling

P.2d at 1060; *Lange*, 151 Ariz. at 261, 727 P.2d at 39. Accordingly, the court properly denied the Browns' request for fees.

¶5 Moreover, even were we to adopt the Browns' argument that they should be deemed in compliance or somehow excused from the requirements of § 12-1103(B), any award of fees was nevertheless discretionary with the trial court.[3] *See Scottsdale Mem'l Health Sys., Inc. v. Clark*, 164 Ariz. 211, 215, 791 P.2d 1094, 1098 (App. 1990) ("It is within the trial court's discretion to determine whether to award attorney's fees to a party who has prevailed in a quiet title action and otherwise complied with the provisions of section 12-1103(B)."); *see also McNeil v. Attaway*, 87 Ariz. 103, 118, 348 P.2d 301, 311 (1960) (same). In ruling on the Browns' fee request, the court stated:

> There were several reasonable, fair, legally justifiable and common sense options available to the parties to settle these differences. Nevertheless, both parties chose to take what the Court believes to be unreasonable positions and pursued expensive, time-consuming litigation. This Court will not

---

dated April 29, 2003, the court denied the Browns' request for fees because, *inter alia*, they "admittedly failed to timely tender a quitclaim deed as required by the statute." We also note the judgment states each party will "bear their own costs and fees."

[3]The Browns assert lengthy arguments attempting to invoke "equitable estoppel" to circumvent the statutory requirements for eligibility for an attorney fee award. However, "[a] claim for estoppel arises when one by his acts, representations or admissions intentionally or through culpable negligence induces another to believe and have confidence in certain material facts and the other justifiably relies and acts on such belief causing him injury or prejudice." *St. Joseph's Hosp. and Med. Ctr. v. Reserve Life Ins. Co.*, 154 Ariz. 307, 317, 742 P.2d 808, 818 (1987). The Browns have not demonstrated any justifiable reliance on any representations by the McFarlands. Nor have they shown how a statute, that even upon full compliance with its terms leaves discretion with the trial court to determine if attorney fees should be awarded, can create a promise upon which to base a claim for equitable estoppel. Thus, we do not address the issue further.

> reward such conduct by any party, with a discretionary award of attorneys' fees.

Section 12-1103(B) is an attorneys' fee statute that is "discretionary and . . . intended to mitigate the expense of litigation to establish a just claim." *Scottsdale Mem'l*, 164 Ariz. at 215, 791 P.2d at 1098. Although the Browns take exception to the trial court's statements, characterizing them as mere "personal sentiment," as opposed to "judicial discretion," we disagree. This relatively simple quiet title action was initially filed in 2001, did not proceed to trial until 2003, and, due to post-trial proceedings, judgment was not entered until 2005. On this record, we would be unable to say the trial court abused its discretion by refusing to award the Browns any attorney fees in this protracted case. *See Scottsdale Mem'l*, 164 Ariz. at 215, 791 P.2d at 1098; *see also McNeil*, 87 Ariz. at 118, 348 P.2d at 311.

Damages for Trespass

¶6 The Browns also contend the court erred by awarding the McFarlands damages "to compensate for debris" that had fallen from the Browns' filled berm onto the McFarlands' property. The Browns claim the award is not supported by the evidence; however, the basis of their argument is essentially that the McFarlands' "improper claim to the disputed property blocked the Browns from remedying the hillside erosion" and "controvert[s] their right to damages." The trial court found "[t]he testimony was uncontroverted that dirt, rocks, boulders, and the like fall off of the plaintiffs' sloped berm and onto the defendants' land" and "[t]he plaintiffs presented no evidence whatsoever to dispute this claim." The Browns rely on evidence that, once the location of the new property line was determined, the County or the Browns might correct the situation. This may explain

why rocks and debris had continued to fall on the McFarland property, but did not controvert the evidence that such debris was on the property.

¶7 Moreover, assuming *arguendo* there was a conflict in the evidence, it was properly resolved by the trial court as the finder of fact, and we do not reweigh conflicting evidence or judge the credibility of witnesses. *See Double AA Builders, Ltd. v. Grand State Constr. L.L.C.*, 210 Ariz. 503, ¶ 41, 114 P.3d 835, 843 (App. 2005); *Pro Finish USA, Ltd. v. Johnson*, 204 Ariz. 257, ¶ 23, 63 P.3d 288, 294 (App. 2003).

¶8 The Browns also claim the McFarlands are responsible for any delay in remediating the debris problem because they "wrongfully disputed the property line," apparently by participating in this lawsuit brought by the Browns and defending the boundaries reflected in their deed. Unsurprisingly, the Browns have cited no authority for this contention and we do not address it further.

Disposition

¶9 The trial court's judgment of March 22, 2005 is affirmed. Although each party has requested their attorneys' fees on appeal, we, in our discretion, decline to award fees to either side.

_____
PHILIP G. ESPINOSA, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
GARYE L. VÁSQUEZ, Judge